No. 10-262

Supreme Court, U.S.
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In the Supreme Court of the United States

WILLIAM WILCOX and SHIRLEY WILCOX, his Wife,
Petitioners,

v.

JEREMIAH FENN, OSCAR GILLIAM, and DOUGHERTY COUNTY, GEORGIA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONERS' REPLY BRIEF

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QUESTION PRESENTED

Whether the lower court correctly held – in conflict with this Court's decision in *Sacramento v. Lewis* and the views of eight other federal circuits – that a federal civil rights claim predicated on Fourteenth Amendment Substantive Due Process requires proof of an "intent to harm" (as opposed to "deliberate indifference" to a substantial, state-created risk of severe injury or death) when the government official had an adequate opportunity to deliberate about the constitutionality of his conduct and where the official's conduct served no legitimate governmental objective.

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REASONS FOR GRANTING THE PETITION

In their opening brief, Petitioners identified three reasons why *certiorari* should be granted – (1) the decision below conflicts with this Court's decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), thus warranting summary reversal, (2) alternatively, if *Lewis* does not justify summary reversal, the split among the federal courts of appeal over the proper culpability standard established by *Lewis* warrants plenary review, and (3) this petition presents an ideal vehicle for the court to elaborate on the meaning of *Lewis*. Respondents dedicate most of their brief to rebutting the first proposition, address the second only in passing, and do not contest the third at all. Ultimately, none of their arguments diminishes the appropriateness of either summary reversal or plenary review.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *LEWIS* AND WARRANTS SUMMARY REVERSAL.

Respondents argument (at 4-11) that the decision below does not conflict with *Lewis* has two strands. First, citing several of this Court's decisions, Respondents argue that § 1983 was not designed to turn the Due Process Clause into a vehicle for garden-variety torts. Second, Respondents maintain that only those actions involving deliberate misconduct, not misconduct entailing any less culpable mental state, are cognizable under § 1983 as a violation of the Due Process Clause. Both of these arguments belittle the true scope of *Lewis*.

First, this Court has cautioned against turning the Fourteenth Amendment into a "font of tort law," *Paul v. Davis*, 424 U.S. 693, 701 (1976), but the Due Process Clause, especially its substantive component, is a more important, far deeper, constitutional well than ordinary tort law. Indeed, the substantive component of the Due Process Clause is the final constitutional rampart protecting citizens from arbitrary abuses of official power. Its lineage traces back at least to the Magna Charta, *see e.g.* ***Ingraham v. Wright***, 430 U.S. 651, 672-673 (1977); ***Lewis,*** 523 U.S. at 845, citing ***Bank of Columbia v. Okely,*** 17 U.S. 235, 4 Wheat. 235-244, (1819); and ***Hurtado v. California,*** 110 U.S. 516, 527 (1884); and the Glorious Revolution of 1688. John Locke, in his famous *Second Treatise on Government*,[1] expounded the philosophical justification of that revolution derived from an opposition to the tyranny of arbitrary power wielded by previous English monarchs. Locke described tyranny as follows:

> . . . [T]yranny is the exercise of power beyond right, which nobody can have a right to; and this is making use of the power any one has in his hands, not for the good of those who are under it, but for his own private, separate advantage. When the governor, however entitled, makes not the law, but his will, the rule, and his commands and actions are not directed to the preservation of the properties of his people, but the satisfaction of his own

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[1] J. Locke, *Second Treatise of Government* (Great Books ed.) (*Second Treatise*).

> ambition, revenge, covetousness, or any other irregular passion.

(Locke, *Second Treatise* at ¶ 199)

In so doing, Locke defined the very nature of limited government which became the dominant philosophical basis of the American Revolution and the Constitution. *See, e.g.* ***City of Boerne v. Flores***, 521 U.S. 507, 540 (1997) (" . . . the background political philosophy of the age (associated most prominently with John Locke)") (Scalia, J., concurring in part).

Nearly 100 years after Locke, Sir William Blackstone repeated Locke's theory with its emphasis on the citizen's personal security and freedom from arbitrary power as if unquestioned fact. 1 W. Blackstone, *Commentaries on the Laws of England*, 38-44 (9th ed., 1783) (first published in four books from 1765 – 1769).

Thus the right to be free of executive abuses of official power is well established both within the historical understandings of "Due Process" predating and surrounding the Clause's adoption, and in this Court's modern jurisprudence on the subject. *See Lewis*, 523 U.S. 833, 846 (1998) (observing that "for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience"). *Lewis* is merely the most recent decision in that long line of precedent, and this case falls within that same tradition of actionable misconduct under the Due Process Clause.

Understandably, Respondents treat the Petition and the facts of this case as if they were nothing more

than an ordinary traffic accident, yet Respondents accepted Petitioners' Statement of the Case which shows, *inter alia*, (1) that Respondent Fenn was charged with vehicular homicide, (2) that the impact with Fenn's vehicle caused William Wilcox to lose control of his vehicle and caused William's severe injury and Milton's death, Pet. App. 28a, ¶ 22; 45a, ¶ 22, and (3) all Respondents admitted that Fenn and Gilliam's conduct "was an abuse of official power that is arbitrary in a constitutional sense." Pet. App. 34a, ¶ 38; 47a, ¶ 38. Respondents are also personally immune from tort liability under state law.[2] Thus, this is no garden-variety negligence case, but one of gross abuse of power by a government actor.

Second, while *Lewis* obviously required proof of "a purpose to cause harm unrelated to the legitimate object of arrest" in the context of a high-speed chase, the court was careful to state that a less culpable mental state still applied in cases involving a non-emergency setting where decisions need not be made in haste: "When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking." *Lewis,* 523 U.S. at 853.

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[2] Compare *Lewis*, 523 U.S. at n.1, where the court notes the officer was immune for "personal injury to or death of any person or damage to property resulting from the operation, in the line of duty, of an authorized emergency vehicle ... ***when in the immediate pursuit of an actual or suspected violator of the law.***" Cal. Veh.Code Ann. § 17004 (West 1971). (emphasis added), and O.C.G.A. § 33-92-3, which is broader and eliminates liability of any officer who "commits a tort involving the use of a covered motor vehicle while in the performance of his or her official duties ..." Wilcox claimed below that this section was unconstitutional under Ga. Const. Art. 1, § 2, ¶ 9(d), but the district court did not rule upon that contention.

A lesser standard would be all the more appropriate when the officer's conduct is advancing absolutely no legitimate law enforcement purpose (an uncontested proposition at this stage of the case).

Two familiar rationales justified the heightened culpability requirement in *Lewis* – (1) a recognition of the split-second decisions that officers must make in the field and (2) a desire not to deter officers in the discharge of their duties out of fear that they may risk civil liability. *Lewis*, 523 U.S. at 852-853. Tellingly, in *Lewis*, those considerations did not cut off a claim entirely, but, instead, necessitated that the plaintiff plead and prove "a purpose to cause harm unrelated to the legitimate object of arrest." *Lewis*, 523 U.S. at 836. Logically, where those considerations are lacking entirely, as here, a less culpable mental state must apply because no countervailing or competing state interests justify the conduct giving rise to the substantial risk of state-created severe injury or death. Under Respondents' reading of *Lewis*, however, the exact same mental state applies in both sets of cases. The distinction made in *Lewis* between prison riot cases, analogized to the police chase case, and prison officials who are deliberately indifferent to the medical needs of their prisoners gives the ax to Respondents' argument and the Eleventh Circuit's holding below. *Id.* at 849-850; 852-853.

II. IF *LEWIS* DOES NOT WARRANT SUMMARY REVERSAL, THEN *CERTIORARI* IS APPROPRIATE TO RESOLVE THE WIDENING CONFLICT BETWEEN THE ELEVENTH CIRCUIT'S DECISION BELOW AND THE OTHER FEDERAL APPELLATE COURTS ABOUT THE SCOPE OF THE *LEWIS* "INTENT TO HARM" RIJLE.

Respondents dedicate the remainder of their brief (at 11-14) to the argument that the decision below does not conflict with the decision of other federal appellate courts. This argument also has two facets. First, Respondents claim that the cases cited in the petition involve factually distinguishable settings. Second, relying on decisions from the Fifth and Seventh Circuit, Respondents claim that regardless of the split the Eleventh Circuit simply concluded that the conduct in this case is not sufficiently egregious. Both of these arguments are wrong.

First, Respondents' emphasis on the factual distinctions between this case and those cited in the petition entirely misses the point. A consistent theme across all of those cases is that the courts, when confronted with either a non-emergency setting or an abuse of official power without any legitimate purpose, held that a less culpable mental state (such as deliberate indifference) applied to the claim. Those holdings applying the lesser culpability standard did not turn on the specific factual setting such as a student suicide or off-duty drinking. Rather, the salient fact was that the officer had an adequate opportunity to deliberate before engaging in the conduct that resulted in the injury to the plaintiffs.

This case, as it comes to this Court, shares that essential, and admitted, fact. Pet. App. 27a, ¶18; 45a, ¶15—18. Consequently, under all of the decisions cited by the petition, there is every reason to believe that the result would have been different in the other circuits (and conversely, those cases would have come out differently under the Eleventh Circuit's crabbed rule). That is the hallmark of a classic split on a pure question of law that warrants plenary review

Second, far from supporting Respondents' position, the Fifth and Seventh Circuit decisions actually support Petitioner's case for *certiorari*. *See Daniels v. City of Dallas*, 272 Fed. Appx. 321 (5th Cir. 2008) (*per curiam*); *Hill v. Shobe*, 93 F.3d 417 (7th Cir. 1996). In its unpublished decision in *Daniels*, the Fifth Circuit applied the deliberate indifference standard to a case involving an accident with police responding to a non-emergency call (unlike the Eleventh Circuit, the Court expressly declined to decide whether the *Lewis* "intent to harm" standard applied in that setting). Similarly, in *Hill* (a decision predating *Lewis*), the Seventh Circuit also applied a deliberate indifference standard to a case involving an accident in which police entered an intersection. Thus, if relevant, these cases re-enforce how much of an outlier the court below was when it applied the "intent to harm" standard. Not only were the officers in this case (as in *Daniels* and *Hill*) not responding to an emergency call, they were affirmatively abusing their power by driving at a breakneck speed, in tandem, for an extended period of time, with absolutely no lawful purpose justifying their conduct. And, once they arrived at their destination they were to prevent private citizens from doing exactly what they had just done!

Put simply, if the decision below does not flatly contradict *Lewis*, it certainly cries out for plenary review in order to explicate the scope of the "intent to harm" standard. *Lewis* was decided twelve years ago, and in that time the circuit courts of appeal and the district courts have struggled mightily to apply *Lewis* to various claims involving police or government actor misconduct. A Westlaw Keycite search of *Lewis* reveals sixty-four decisions that either decline to extend, distinguish or recognize a limitation in the holding of *Lewis*.[3] In total, *Lewis* has been cited over 3400 times in court decisions[4] and in over 1000 secondary sources.

Clearly, *Lewis* did not mean for the intent to harm standard to apply to all cases of police operating motor vehicles. *Lewis*, 523 U.S. at n. 5, 842. That and the other discussion of when a lesser standard applies has led the Circuit Courts of Appeals[5] to split on the proper standard to be applied when government actor misconduct is the result of an opportunity for deliberation without haste, but the Eleventh in this and other cases has nevertheless held that even when the government actor has ample opportunity for deliberation without haste and his or her conduct otherwise meets the reckless indifference standard,

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[3] Some of these decisions deal with whether the constitutional issue should be decided before the issue of qualified immunity, so those do not address directly the culpability standard for substantive due process claims.

[4] See note 1.

[5] The Fourth Circuit has not yet explicitly ruled on the issue.

the plaintiff must still allege and prove the actor's intent to harm the plaintiff specifically.

CONCLUSION

The conflict between the decision below and *Lewis* and the Circuit Court of Appeals' decisions is acute, longstanding and deserving of this court's review. For the foregoing reasons and those set forth in the petition, a writ of *certiorari* should be granted.

Respectfully submitted,

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